Filed 7/15/19 Kealy v. Ford Motor Credit Co., LLC CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PATRICK KEALY, Plaintiff and Respondent, v. FORD MOTOR CREDIT COMPANY, LLC, Defendant and Appellant.	B286410 (Los Angeles County Super. Ct. No. BC497696)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Elihu M. Berle, Judge. Reversed, in part, and remanded.

Horvitz & Levy, Lisa Perrochet and Jason R. Litt, Severson & Werson, Scott J. Hyman, Kristin L. Walker-Probst and David A. Berkley, for Defendant and Appellant.

Hua Gallai, Nicholas T. Hua and Giacomo Gallai, for Plaintiff and Respondent.

I. INTRODUCTION

Plaintiff Patrick Kealy sued defendant Ford Motor Credit Company for, among other things, making inaccurate credit reports to credit reporting agencies in violation of the Consumer Credit Agencies Reporting Act (Civ. Code § 1785.1 et seq. (the Act)). The jury found defendant liable for violations of the Act and awarded plaintiff economic, noneconomic, and punitive damages. Following entry of judgment on the special verdict, the trial court granted, in part, plaintiff's motion for attorney fees and defendant's motion to tax costs.

On appeal from the judgment, defendant contends there was insufficient evidence to support the jury's finding that defendant's inaccurate credit reporting caused economic damage to plaintiff. Defendant also argues that the evidence was insufficient to support the noneconomic damage award and that, absent actual damage, plaintiff was not entitled to punitive damages. Finally, defendant asserts that the attorney fee award based on the judgment cannot stand if the judgment is reversed in whole or part.

In a cross-appeal, plaintiff purports to challenge the amount of the attorney fee award, claiming the trial court abused its discretion in reducing the amount of fees sought. Plaintiff also cross-appeals from the pretrial order granting summary adjudication of his claim for violation of the Unfair Business Practices Act (Bus. and Prof. Code § 17200 et seq. (UCL)).

We hold that there was insufficient evidence to support the finding that defendant's inaccurate credit reports caused the economic damages plaintiff sought at trial. We further hold that there was sufficient evidence to support the award of

noneconomic damages and that the punitive damage award was therefore properly based on plaintiff's actual damages.

On the cross-appeal, we dismiss plaintiff's challenge to the attorney fee award because that postjudgment order is not subject to the cross-appeal procedure, but rather must be separately appealed. We also affirm the order summarily adjudicating plaintiff's UCL claim.

We therefore reverse the judgment on the jury's economic damage award and remand the matter with instructions to enter a new judgment that omits that award and to conduct further proceedings on whether to modify the attorney fees award in light of that reduced judgment.

II. APPEAL

A. *Factual Background*

1. Vehicle Lease

Plaintiff, a general contractor, lived on Monterey Boulevard in Hermosa Beach, California. In 2005, plaintiff agreed to cosign a vehicle lease for Emily Cruz,[1] who lived and worked in Massachusetts. Plaintiff executed the necessary documents[2]

---

[1] Cruz is sometimes also referred to in the record by her maiden name, Morrisette.

[2] Among the documents plaintiff executed was an auto debit enrollment form that authorized defendant to automatically transfer from plaintiff's checking or savings account a payment of an unpaid monthly installment.

from defendant which were faxed to him by a Ford dealership in Massachusetts. By executing the documents, plaintiff understood that if Cruz did not make a monthly payment on the lease to defendant, he would be required to pay it. Among other things, the lease required monthly payments to defendant of $550 and provided that the maximum mileage allowed during the duration of the three-year lease was 31,539. He also understood that, in the event the vehicle was driven beyond that mileage limitation, there would be an excess mileage fee of $0.20 per mile.

Sometime in 2006, Cruz's business was in "turmoil," and by the end of January 2007, she closed it. In February or March 2007, Cruz filed for bankruptcy. When Cruz's business failed, plaintiff took over making the monthly payments under the lease and continued paying them through the end of the lease pursuant to the cosigner obligation.

In October 2008, at the end of the three-year lease, Cruz returned the vehicle to the dealership with a final mileage reading on the odometer of over 71,000 miles. Defendant calculated that the amount due for excess wear and mileage was $9,212.92. In late 2008, plaintiff received notice there was an outstanding excess mileage fee on the lease account of over $9,200. Although plaintiff had the ability to pay the excess mileage fee, he refused to do so because defendant had assured him when he made the last monthly lease payment that he had no further obligation under the lease.

2. Inaccurate Credit Reports

Although plaintiff asserted several alleged instances of inaccurate credit reporting by defendant between 2008 and 2013,

the trial court ruled prior to trial that damage claims based on inaccurate credit reports made on or before May 2011[3] were time-barred, and plaintiff admits that the jury based its verdict on only two reports within the limitations period, but he does not specify which two reports were inaccurate. We discuss some alleged inaccurate reports that predate May 2011 for background and context.

Sometime between January 1, 2010, and September 1, 2011, defendant reported plaintiff's outstanding account balance on the lease for excessive wear and mileage fees as "charged off,"[4] i.e., "[u]npaid balance reported as a loss by credit grantor . . . ." On February 16, 2009,[5] however, the status of the account was "current" because plaintiff had disputed the charge-off and the parties were attempting to resolve the matter.[6]

---

[3] The verdict forms, however, asked the jurors to decide whether defendant made any inaccurate reports after April 18, 2011.

[4] Plaintiff's credit expert explained that "[i]n credit reporting, [a charge-off] would be when the creditor charges off the account, . . . it would be similar to . . . something going to collection after it's been past due for typically . . . six months."

[5] The parties dispute the date on which credit reporting agencies first received defendant's report that the account had once again been charged-off.

[6] In September 2011, and again in April 2013, defendant incorrectly reported that the balance owed on the lease by plaintiff was $9,762, instead of $9,212. Plaintiff did not submit

In September 2011, and again in April 2013, defendant incorrectly reported that the date of first delinquency on defendant's account was August 2008, when, in fact, it first became delinquent in October 2008.

On June 3, 2013, and again on July 10, 2013, defendant inaccurately reported that it had received a payment from plaintiff in March 2013. Plaintiff, however, had not made any payments on the account since 2008.

On May 2, June 28, and August 30, 2013, based on inquiries from plaintiff, Experian, a credit reporting agency, reported a so-called "purge date"[7] for plaintiff's lease account of January 2020. Plaintiff's credit expert, however, explained that the purge date on plaintiff's account should have been in 2015.

3. Economic Damages

In support of his claim that defendant's inaccurate credit reporting caused him economic damage, plaintiff testified about his failed efforts to refinance his personal residence in 2013 to take advantage of low interest rates and a conventional fixed-rate mortgage. He then presented testimony from three experts to support his theory that, as a result of defendant's inaccurate credit reports, he was unable to qualify for a conventional 30-year fixed-rate loan that would otherwise have been available to him.

---

any evidence that this inaccuracy detrimentally affected plaintiff's ability to obtain a loan.

[7] According to plaintiff's credit expert, derogatory items on a credit report are generally removed, or purged, from credit reports seven years after the date of first delinquency.

According to plaintiff, he purchased his home on Monterey Boulevard in Hermosa Beach in 1998. In or about June 2013, he had a variable-rate first mortgage of around $840,000 on his home and a variable-rate credit line of around $190,000. Because interest rates were historically low in 2013, plaintiff saw an opportunity to refinance his home with a conventional fixed-rate loan and pay off his two variable-rate loans.

In 2013, plaintiff explored refinancing his home. He explained that, at that time, he "was [pretty] close to getting [his credit score] above 700. [He] was working on it. It was pretty much there." Plaintiff understood that a 700 credit score "was the benchmark that most [of] the brokers were giving [him] that would qualify [him] for a conventional loan, which would allow [him] to adopt into [sic] those low interest rates."

Plaintiff contacted several brokers in 2013, but was told he could not obtain a conventional fixed-rate loan because his credit score was below 700. Specifically, in February 2013, plaintiff contacted broker Nader Chahine about obtaining a conventional 3.5 percent fixed-rate loan on his home. But he was informed by Chahine that his credit score of 674 was too low to qualify for such a loan. In plaintiff's view, a score of 674 was "getting" close to the 700 score that he needed to qualify for a conventional fixed-rate loan.

In June 2013, after defendant inaccurately reported that plaintiff had made a payment on his outstanding lease account in March 2013, plaintiff checked his credit score again and discovered that it was at 660. Plaintiff blamed defendant for the reduction in his score.

In July 2013, plaintiff instructed his employee, Russ Safin, to contact broker Jerry Stirnkorb, inform him of the 660 credit

score, and inquire about the possibility of obtaining a conventional fixed-rate loan. On July 15, 2013, Safin sent Stirnkorb an e-mail inquiring about refinancing. He later overheard plaintiff on the office telephone discussing the loan, and observed that plaintiff "wasn't happy" because "he didn't get the loan." According to plaintiff, once his credit score was reduced to 660, he realized that he was wasting his time trying to refinance to a conventional fixed-rate loan.

Douglas Minor testified for plaintiff as a credit expert. He was the president of a company that specialized "in helping businesses and consumers with credit issues, [such as] small businesses building credit [and] consumers . . . who want[ed] to improve their credit [scores]."

According to Minor, "the [credit] reporting [by defendant] that occurred in 2013 was inaccurate." The probability was "extremely high" that defendant's inaccurate report in 2013—that plaintiff had made a payment on the lease account in March of that year—had a negative impact on plaintiff's credit score.

On the issue of whether the inaccurate reporting in 2013 of a 2020 purge date—as opposed to the accurate 2015 date[8]—had a negative impact on plaintiff's credit score, Minor testified that he did not believe that the inaccurate purge date would have "much of an impact on the credit scoring model." But it would have an effect on plaintiff's "creditworthiness," depending on the underwriting guidelines applied by the lender. In any event, Minor ultimately conceded that he did not see anything sent from defendant to Experian that would have caused it to report the 2020 purge date.

---

[8] Minor confirmed that by 2015, the lease account no longer appeared in plaintiff's credit reports.

Minor also explained that the inaccurate reporting of the date of first delinquency as August 2008, as opposed to October 2008, could have the effect of "mov[ing] the purge date out an extra two months," but he did not opine that the inaccurate reporting of the first delinquency date had a negative effect on plaintiff's credit score. Instead, he opined that such an inaccuracy could "lead to consumers disputing what's happening on their account" and that lenders consider such information when deciding whether to make a loan.

On the issue of defendant changing plaintiff's account status from current to charged off, sometime between January 2010 and September 2011, Minor believed that the more recent the charge-off information was, "the more negative the impact on the credit score." He also stated that if plaintiff's account had been charged-off in 2008, it should have been reported that way consistently thereafter. Minor explained that if a consumer's account was "reported as a charge-off, then it's [reported as] current, and then it's being reported as a charge-off again . . . it would be confusing to most consumers." But Minor ultimately concluded that the charge-off could have either a negative or a positive impact on an applicant's credit profile and credit score.

James Hibert testified for plaintiff as a mortgage expert. According to Hibert, lenders prefer working with mortgage brokers because "it's a time[]saver for a [lender] when they work with a mortgage broker because they're not going to be reviewing . . . loans that don't fit for them." Hibert further explained that it was common for a broker not to submit a loan application to a lender on behalf of a borrower if it was clear the borrower would not qualify for a loan.

Hibert conceded that lenders "look at a [potential borrower's] credit score first." In his opinion, "the higher the score, the better the loan . . . . [¶] The lower the score, the not-so-good loan terms or no loan at all." Hibert further explained that, in his experience, lenders would not make an exception for borrowers whose credit scores fell below the lender's minimum required score, even for a difference as small as six points.

Although Hibert confirmed that the credit score was the starting point of the analysis, other factors based on a credit report were considered by lenders in determining whether to make a loan. Moreover, the fact that plaintiff had been disputing defendant's credit reporting would be a factor a lender would consider in addition to his credit score. Based on the unspecified documentation that Hibert reviewed, it was his opinion that plaintiff's disputes of defendant's credit reporting played "a factor" in his "inability to get a loan underwritten for him" in 2015.[9] Plaintiff's annual income, which Hibert believed was around $200,000, was sufficiently high to qualify for a loan.

In Hibert's experience, it was common for a borrower to want to replace a variable-rate loan with a fixed-rate loan because with the latter loan, the borrower "know[s] that the [interest] rate is not going to change, [the monthly] payment is not going to change."

Based on his review of plaintiff's mortgage statements, Hibert confirmed that the variable interest rates plaintiff paid between 2013 and 2015 were higher than available fixed-rate loans during that time.

---

[9] It is unclear from the record why Hibert was asked about his opinion as it related to 2015, as opposed to the June to July 2013 time frame.

Frank Wisehart testified as plaintiff's economic expert and provided an economic damage calculation. Wisehart testified about how much money plaintiff could have saved had he been able to obtain a loan with a lower interest rate in June 2013. Because that testimony is not relevant to our decision, we do not discuss the details of it here. But in making his damage calculations, Wisehart assumed that plaintiff would have qualified for a conventional fixed-rate loan and had no opinion concerning plaintiff's ability to qualify for such a loan or the party responsible for his failure to secure a fixed-rate loan in June 2013. Wisehart also conceded that if plaintiff did not qualify for the loan, he would not have lost the opportunity to obtain the fixed interest rate.

4. Noneconomic Damages

Plaintiff testified that dealing with defendant on the credit reporting issues over an extended period of time was "incredibly time consuming" and made him "stressed out." "Sometimes [he] would break out in rashes . . . dealing with this issue." He believed coworkers observed his rashes and saw him "annoyed a few times." The credit reporting issues with defendant also caused him to lose motivation at work and bothered him so much he would lose sleep.

According to Safin, he overheard plaintiff dealing with lenders "not in a good mood or a bit angry on [his] cell phone." He also saw plaintiff "dropping the phone and being angry . . . ." Safin explained that plaintiff was "upset" with defendant.

B. *Procedural Background*

On July 13, 2011, defendant sued plaintiff (case number SB11C02500) for breach of contract, open book account, and account stated seeking to recover the outstanding balance due on the lease account for excessive wear and mileage. On August 22, 2011, plaintiff, acting in pro. per., cross-complained against defendant for "damages" and "harassment" and also filed a "response" to defendant's complaint. On March 8, 2012, plaintiff, through counsel, filed a first amended cross-complaint for negligence, violation of the Fair Debt Collection Practices Act, Civil Code section 1788, et seq., and violation of Civil Code section 1799.90, et seq. On December 4, 2012, plaintiff filed a first amended answer.

On July 15, 2013, plaintiff filed the operative second amended class action complaint against defendant (case number BC497696) asserting causes of action for violation of Civil Code section 1785.25, subdivision (a), negligence, and violations of the UCL based on underlying violations of Civil Code section 1799.91, subdivisions (a) and (d), and 16 Code of Federal Regulations part 444.3.

On December 19, 2014, the trial court granted defendant's motion for summary adjudication of the third and fourth causes of action for violation of the UCL based on underlying violations of Civil Code section 1799.91, subdivisions (a) and (d).

On January 14, 2016, the trial court granted summary judgment in favor of defendant on its breach of contract claim for excess wear and mileage in the amount of $9,212.92 finding, among other things, that plaintiff's argument—that the lease was unenforceable due to defendant's failure to serve the required

notice-to-cosigner under Civil Code section 1799.91—was "unavailing."

The matter proceeded to trial, and jury selection commenced on August 14, 2017. On August 25, 2017, the jury returned a special verdict in favor of plaintiff. The special verdict form read as follows: "We the jury empaneled in the above-entitled action answer the questions submitted to us as follows: [¶] 1. Did [defendant] furnish inaccurate or incomplete information regarding [plaintiff] to a consumer credit reporting agency after April 18, 2011? YES [¶] 2. Did [defendant] know, or should it have known, that the information furnished regarding [plaintiff] to a consumer credit agency was inaccurate or incomplete at the time it furnished the information? YES [¶] 3. At the time it furnished incomplete or inaccurate information regarding [plaintiff] to a consumer credit reporting agency, did [defendant] maintain reasonable procedures to comply with the []Act? NO [¶] 4. Did the inaccurate or incomplete information furnished by [defendant] cause [plaintiff] damages related to his loans on […] Monterey Blvd., Hermosa Beach, California? YES [¶] 5. What damages did [plaintiff] suffer after April 18, 2011, as a result of [defendant] furnishing inaccurate or incomplete information? [¶] A. Economic Damages: $345,000.00 [¶] B. Non-economic Damages: $25,000.00 [¶] 6. Did [defendant] willfully furnish inaccurate or incomplete information to a consumer credit reporting agency regarding [plaintiff] after April 18, 2011? YES [¶] 7. What amount of punitive damages, if any, do you award to [plaintiff]? [¶] Punitive Damages Award: $9,212.92"

On August 29, 2017, the trial court entered judgment on the special verdict in favor of plaintiff. On September 13, 2017,

defendant filed a motion for partial judgment notwithstanding the verdict (JNOV). Plaintiff opposed the partial JNOV motion, and the trial court denied the motion on October 19, 2017.

Plaintiff filed a motion for an award of attorney fees in the amount of $772,043.95, and defendant filed a motion to tax costs. On November 30, 2017, the trial court granted the fee motion, in part, awarding plaintiff $325,709 in fees, and also granted defendant's motion to tax costs, in part.

On November 17, 2017, defendant filed a notice of appeal from the judgment, and on December 6, 2017, plaintiff filed a notice of cross-appeal from the judgment and also purportedly cross-appealed from the postjudgment order awarding fees and costs. Plaintiff, however, did not file a separate appeal from the trial court's postjudgment order awarding attorney fees.

C. *Discussion*

1. Economic Damages

a. Contentions

Defendant contends, among other things, that there was insufficient evidence to show that its inaccurate credit reports caused plaintiff the economic damage that he claimed. According to defendant, plaintiff admitted that brokers to whom he spoke in 2013 told him that he needed a 700 credit score to qualify for the conventional fixed-rate loan he wanted and that, based on his scores of 674 and 660, he would not qualify for such a loan. Because none of plaintiff's experts testified that any of defendant's inaccurate reports caused his score to drop below the

700 threshold, defendant maintains that its reporting was not the legal cause of plaintiff's inability to obtain the loan he wanted.

b. Standard of Review

"When an appellant contends the evidence is insufficient to support a judgment, order, or factual finding, we apply the substantial evidence standard of review. 'Where findings of fact are challenged on a civil appeal, we are bound by the "elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court.' [Citation.] 'Substantial evidence' is not synonymous with 'any' evidence; rather, it means the evidence must be of ponderable legal significance, reasonable, credible, and of solid value. [Citation.] An appellate court presumes in favor of the judgment or order all reasonable inferences. [Citation.] If there is substantial evidence to support a finding, an appellate court must uphold that finding even if it would have made a different finding had it presided over the trial. [Citations.] An appellate court does not reweigh the evidence or evaluate the credibility of witnesses, but rather defers to the trier of fact. [Citations.]" (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 957-958.)

c. Legal Principles

Plaintiff proceeded to trial only on his cause of action for violation of the Act, specifically Civil Code section 1785.25, subdivision (a), which provides, in pertinent part: "A person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate." Section 1785.25,[10] however, "does not itself create a private cause of action . . . ." (*Sanai v. Saltz* (2009) 170 Cal.App.4th 746, 771, fn. 18 (*Sanai*).) Instead, the private right of action for actual and punitive damages, as well as injunctive relief, for any consumer aggrieved by a violation of any provision the Act is established in Civil Code section 1785.31, subdivision (a) which provides, in pertinent part, "Any consumer who suffers damages as a result of a violation of this title by any person may bring an action in a court of appropriate jurisdiction against that person to recover the following [remedies] . . . ." (See *Sanai, supra*, 170 Cal.App.4th at p. 771, fn. 18.)

---

[10] Section 1785.25, subdivision (g) establishes an affirmative defense to an alleged violation of subdivision (a) by providing, in pertinent part, "A person who furnishes information to a consumer credit reporting agency is liable for failure to comply with this section, unless the furnisher establishes by a preponderance of the evidence that, at the time of the failure to comply with this section, the furnisher maintained reasonable procedures to comply with those provisions."

By its terms, and consistent with the trial court's instruction to the jury,[11] Civil Code section 1785.31, subdivision (a) requires an aggrieved consumer to demonstrate that the alleged violation of the Act which forms the basis of his or her action *resulted in damages*, i.e., was the proximate or legal cause of the damages claimed. "To be considered a proximate cause of an injury, the acts of the defendant must have been a 'substantial factor' in contributing to the injury. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 969 . . . .) Generally, a defendant's conduct is a substantial factor if the injury would not have occurred but for the defendant's conduct. (*Ibid*.) If the injury "'would have happened anyway, whether the defendant was negligent or not, then his or her negligence was not a cause in fact, and of course cannot be the legal or responsible cause.'" (*Toste v. CalPortland Construction* (2016) 245 Cal.App.4th 362, 370 . . . , quoting 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1185, p. 552.) As our high court has explained, "'a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor.'" (*Bockrath v. Aldrich Chemical Co*. (1999) 21 Cal.4th 71, 79 . . . .)" (*Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283, 1303.)

"Although proof of causation may be by direct or circumstantial evidence, it must be by 'substantial' evidence, and evidence 'which leaves the determination of these essential facts in the realm of mere speculation and conjecture is insufficient.'

---

[11] The trial court instructed the jury that, "[i]f you find that [plaintiff] proved that [defendant] violated [the Act, plaintiff] bears the burden of proving that he suffered damages *as a result of each such violation*." (Italics added.)

(*Showalter v. Western Pacific R. R. Co*. (1940) 16 Cal.2d 460, 471 . . . ; see also Prosser & Keeton, Torts (5th ed. 1984) § 41, p. 269 [a mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to determine the issue in favor of the defendant as a matter of law].") (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 484.)

When, as here, a plaintiff seeks to show causation through expert testimony, the principles governing the nature and extent of such a showing are well established. "[W]hen the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. [Citation.] For example, an expert's opinion based on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors [citation], has no evidentiary value [citation] and may be excluded from evidence. [Citations.] Similarly, when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an 'expert opinion is worth no more than the reasons upon which it rests.' [Citation.]" (*Jennings v. Palomar Palmerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117 (*Jennings*).)

"[P]roffering an expert opinion that there is some theoretical possibility the negligent act *could have been* a cause-in-fact of a particular injury is insufficient to establish causation. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775-776 . . . ; accord, *Leslie G. v. Perry & Associates*[, *supra,*] 43 Cal.App.4th [at p.] 487 . . . . Instead, the plaintiff must offer an

expert opinion that contains a reasoned explanation illuminating why the facts have convinced the expert, and therefore should convince the jury, that it is *more probable than not* the negligent act was a cause-in-fact of the plaintiff's injury." (*Jennings, supra,* 114 Cal.App.4th at p. 1118.)

d. Analysis

We agree with defendant that there was insufficient evidence that any of its inaccurate credit reports during the limitations period caused plaintiff to lose the opportunity to refinance his home mortgage to a conventional fixed-rate loan in June 2013. According to plaintiff's testimony, he explored refinancing his home to a fixed-rate loan in 2013, because interest rates were low. But the brokers he consulted during that time frame unequivocally informed him that he would need to reach a "benchmark" credit score of 700 in order to qualify for such a loan. The only specific evidence of plaintiff's credit score during that time frame, however, concerned his 674 score in February 2013 and his 660 score in June 2013. But as to each of those scores, the brokers with whom he or his proxy spoke informed him they were too low to qualify for the fixed-rate loan product he desired.

Although plaintiff did introduce his credit expert's testimony that suggested his 660 score in June 2013 may have been the result of defendant's inaccurate reports—in June and July 2013—of a phantom March 2013 payment on the lease account, that score reduction occurred only *after* defendant's inadequate February 2013 score of 674. And, there was no evidence linking any previous inaccurate report by defendant

during the limitations period to plaintiff's sub-700 score in February. While Hibert testified generally that defendant's credit reporting played "a factor" in plaintiff's inability to obtain a loan in 2015,[12] neither he nor any other witness testified that defendant's reporting played a substantial factor in plaintiff's inability to obtain a fixed-rate loan, or that but for defendant's inaccurate reports, plaintiff could have obtained such a loan. Absent such testimony, plaintiff failed to produce sufficient evidence to show that defendant was the proximate cause of his lost refinancing opportunity in June 2013.

Plaintiff argues that his testimony supported an inference that his credit score would have likely reached the required 700 benchmark in the March through May 2013, timeframe. That testimony, however, was purely speculative on his part, i.e., plaintiff claimed that when he had a credit score of 674 in or about February 2013, he was "getting" close to the benchmark of 700, but he never testified that he actually reached that goal or produced any other testimony or evidence establishing that he did. That score was a full 26 points below the minimum required amount for the conventional fixed-rate loan plaintiff desired; and plaintiff's mortgage expert, Hibert, emphasized that even a credit score only six points shy of a lender's minimum requirement would result in the borrower not being considered for the loan he or she desired.

Plaintiff also points to his experts' testimony that: (i) other factors, in addition to credit score, were included in lenders' loan-making decisions, such that certain of defendant's other inaccurate reports may have negatively affected his overall

---

[12] As discussed above, plaintiff testified only about his efforts to refinance his mortgage in 2013.

"creditworthiness;" and (ii) a score of 700 may not have been the benchmark for all lenders. But plaintiff did not testify or present other evidence that the brokers with whom he consulted in 2013 expressed any concern about his creditworthiness, other than his credit score, or that they ever suggested a benchmark credit score for the desired loan other than 700. Moreover, plaintiff did not testify or present evidence that he applied for loans and was rejected due to *other concerns* about his creditworthiness, or that he was discouraged by his brokers from submitting applications due to such other concerns. Thus, the expert testimony that unspecified lenders may also have been concerned about other credit issues on his reports attributable to defendant was too speculative and factually unsupported to qualify as substantial evidence of causation.

The factual predicate of plaintiff's entire economic damage theory was his testimony about his unsuccessful efforts in 2013 to work with various brokers on refinancing his home and their uniform assertions that his sub-700 credit score during that time, by itself, disqualified him from applying for fixed-rate loans. That testimony, however, fell short of establishing that, but for defendant's inaccurate reports in or about 2013, defendant would have achieved the required credit score of 700, or above, and therefore would have qualified for the fixed-rate loan product that was the basis of his damage calculation.

2. Noneconomic Damages

a. Contentions

Defendant contends that there was insufficient evidence to support the jury's award of $25,000 in noneconomic damages. According to defendant, its *accurate* credit reporting concerning plaintiff's failure to satisfy the legitimate excess wear and mileage fee, including its reports that the account had been charged-off, could not have caused plaintiff emotional distress because they were true; and because the inaccurate reports that his account was current and that he had made a payment on the charged-off account did not cause him financial harm, he could not have been distressed over those reports.

b. Legal Principles/Standard of Review

"Noneconomic damages compensate an injured plaintiff for nonpecuniary injuries," including "physical pain and various forms of mental anguish and emotional distress. [Citation.] Such injuries are subjective, and the determination of the amount of damages by the trier of fact is equally subjective." (*Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1332.) Noneconomic damages include more than emotional distress and pain and suffering. (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 300.) "[A] plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal." (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892-893.) "There is no fixed standard to determine

the amount of noneconomic damages. Instead, the determination is committed to the discretion of the trier of fact." (*Corenbaum v. Lampkin, supra*, 215 Cal.App.4th at p. 1332.)

"We review the jury's damages award for substantial evidence, giving due deference to the jury's verdict and the trial court's denial of the new trial motion. [Citations.] 'In considering the contention that the damages are excessive the appellate court must determine every conflict in the evidence in respondent's favor, and must give him the benefit of every inference reasonably to be drawn from the record. . . .'" (*Bigler-Engler v. Breg, Inc., supra*, 7 Cal.App.5th at p. 300.)

c. Analysis

Defendant's argument on the noneconomic damage issue ignores plaintiff's evidence that, during the limitations period, he had been unsuccessfully trying to work with defendant to clear up its inaccurate and inconsistent credit reporting concerning his lease account. It also ignores his testimony that during 2013, he was specifically trying to refinance his home to achieve better interest rates and that he *believed,* albeit erroneously, that defendant's inaccurate reporting may have contributed to his inability to accomplish that goal by negatively affecting his credit score. According to plaintiff, all of those unsuccessful dealings with defendant over an extended period of time caused him to be annoyed, frustrated, and angry. Those dealings also ultimately caused him to break out in rashes, lose sleep, and become unmotivated and unproductive at work.

Under the legal standard governing jury awards of noneconomic damages discussed above, plaintiff's testimony was

sufficient to support a reasonable inference that defendant's inaccurate and inconsistent credit reporting during the limitations period was a substantial factor in plaintiff's negative emotional and physical responses to his unsuccessful dealings with defendant on credit reporting issues. Substantial evidence therefore supported the jury's noneconomic damages award.

3. Punitive Damages

Defendant's challenge to the jury's punitive damage award is predicated solely on its assertion that plaintiff suffered no actual damages as a result of defendant's violations of the Act. Because we have concluded that the jury's award of noneconomic damages was supported by substantial evidence, i.e., plaintiff suffered actual damage, we must reject defendant's challenge and affirm the punitive damages award.

4. Attorney Fees

Defendant maintains that if the judgment is reversed, in whole or in part, the attorney fee award cannot stand because the trial court based the amount awarded on the amount of the original judgment in favor of plaintiff. We agree.

Although defendant did not separately appeal from the attorney fee award, and we thus lack jurisdiction to review that award, "this does not mean that an award of attorney fees to the party prevailing stands after reversal of the judgment." (*Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284). "'An order awarding costs falls with a reversal of the judgment on which it is based.' [Citations.] '[T]he successful party is never required to pay the

costs incurred by the unsuccessful party.' [Citation.] After reversal of a judgment 'the matter of trial costs [is] set at large.' [Citation.] Although we cannot reverse the order granting costs and fees, the trial court should do so on remand." (*Id*. at p. 1284; see also *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1027 ["(The p)laintiffs ask us to direct the trial court to reverse the award of costs and attorney fees. They do not cite any legal authority in support of their request. None is needed, however, because the award of costs necessarily falls with the judgment"]; *Ulkarim v. Westfield LLC* (2014) 227 Cal.App.4th 1266, 1282 ["Our reversal of the order granting the special motion to strike means that [the defendant] is not a defendant prevailing on a special motion to strike entitled to an attorney fee award under the statute . . . . This compels the reversal of the fee order regardless of whether it was separately appealed"].) The trial court should thus consider whether to modify the attorney fee award on remand in light of our partial reversal of the judgment.

II. CROSS-APPEAL

A. *Attorney Fees*

Plaintiff's cross-appeal from the judgment also purports to cross-appeal from the trial court's postjudgment order awarding him attorney fees. According to plaintiff, the trial court abused its discretion when it substantially reduced the amount of the fees he requested.

Because plaintiff did not file a separate notice of appeal from the postjudgment attorney fee order, we asked the parties to

brief whether plaintiff's cross-appeal from the fee order should be dismissed because a cross-appeal from a judgment does not perfect an appeal from a separately appealable postjudgment order. (*Aheroni v. Maxwell* (1988) 205 Cal.App.3d 284, 295 ["The cross-appeal procedure ([former] Cal. Rules of Court, rule 3(c) [current rule 8.108(g)]) cannot have been intended to give parties the means of securing review, by cross-appeal, of matters not related to the order or judgment which is the subject of the original appeal"]; see also *Pacific Corporate Group Holdings, LLC v. Keck* (2014) 232 Cal.App.4th 294, 306; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2017) ¶ 3:175, p. 3-79 ["A postjudgment order enforcing an appealed judgment (or other order rendered *after* judgment) is *not* cross-appealable in connection with an appeal from a judgment. Rather, the postjudgment order must be *separately* appealed . . ."].)

In his letter brief on this issue, plaintiff, in effect, concedes that his cross-appeal from the judgment did not invoke our jurisdiction over the separate postjudgment attorney fee order. "[Plaintiff] does not object to this [c]ourt proceeding to consider [his] cross-appeal as limited to . . . the trial court's entry of summary ajudication against [plaintiff] . . . on the third cause of action for [violation of the UCL]." Because plaintiff has failed to properly invoke our jurisdiction to grant him affirmative relief on the attorney fee order, we dismiss the cross-appeal from that order.[13]

---

[13] In making this determination, we do not reach the issue of whether the trial court's November 30, 2017, minute order awarding attorney fees is appealable in light of the trial court's

B. *Summary Adjudication*

Plaintiff contends that the trial court erred when it granted defendant's motion for summary adjudication of his third cause of action for violation of the UCL based on defendant's alleged underlying violation of the notice-to-cosigner provisions of Civil Code sections 1799.91, subdivision (a).[14]

1. Factual and Procedural Background

In November 2005, Cruz entered into a lease agreement with defendant at a Ford dealership in East Brookfield, Massachusetts for a 2006 Ford Explorer. Plaintiff cosigned the lease and thereafter executed a credit application. The Ford Explorer was registered in Massachusetts, and not in California, and it was returned to the Ford dealership in East Brookfield, Massachusetts in October 2008.

In the operative second amended class action complaint, plaintiff asserted, among other claims, a third cause of action for violation of the UCL based on an alleged underlying violation of the notice-to-cosigner provision of section 1799.91, subdivision (a) relating to consumer credit contracts. In support of that cause of action, plaintiff alleged that the vehicle lease agreement was a "consumer credit contract" within the meaning of section 1799.91, subdivision (a).

---

direction to counsel in that order to prepare an "appropriate order." (See Cal. Rules of Court, rule 8.104(c)(2).)

[14] All further statutory references are to the Civil Code.

On June 3, 2014, defendant filed a motion for summary judgment/summary adjudication seeking, among other things, summary adjudication of the third cause of action on the grounds that it failed as a matter of law because the vehicle lease was not a "consumer credit contract."

Plaintiff opposed the motion and, on December 19, 2014, the trial court held a hearing and granted summary adjudication on the third cause of action, ruling that defendant was not required to provide plaintiff a notice-to-cosigner under Civil Code section 1799.91, subdivision (a)(4).

Following the trial court's entry of judgment on the jury's special verdict, defendant filed a notice of appeal from the judgment and plaintiff thereafter filed a cross-appeal from the judgment, including any pretrial orders that necessarily affected the judgment, and also purportedly from the postjudgment order awarding attorney fees.

2. Discussion

a. Standard of Review

"A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); see also *id.*, § 437c, subd. (f) [summary adjudication of issues].) The moving party bears the burden of showing the court that the plaintiff 'has not established, and cannot reasonably expect to establish, a prima facie case . . . .' (*Saelzler v. Advanced Group 400*[, *supra*,] 25 Cal.4th at p. 768 . . . .) On appeal from the granting of a motion for summary

judgment, we examine the record de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party. (*Wiener v. Southcoast Childcare Centers, Inc*. (2004) 32 Cal.4th 1138, 1142 . . . .)" (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.)

b. Legal Principles

Plaintiff's contention on appeal concerning the application of the notice-to-cosigner requirements of section 1799.91 requires us to interpret the relevant provisions of that section and section 1799.90 defining consumer credit contracts and vehicle leases.

"The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] 'In determining intent, we look first to the language of the statute, giving effect to its "plain meaning."' [Citations.] . . . Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) "'A construction making some words surplusage is to be avoided.'" (*Grupe Development Co. v. Superior Court* (1993) 4 Cal.4th 911, 921.)

"[I]f the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute. [Citation.] In the end, we

"'must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citation.]'" (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003.)

c. Analysis

Plaintiff argues that defendant's lease agreement with Cruz—under which he cosigned and guaranteed to make monthly lease payments in the event Cruz failed to do so—was a contract involving a loan or extension of credit secured by personal property within the meaning of sections 1799.90 and 1799.91, subdivision (a).[15] According to plaintiff, defendant's failure to

---

[15] Section 1799.91, subdivision (a) provides, in pertinent part: "(a) Unless the persons are married to each other, each creditor who obtains the signature of more than one person on a *consumer credit contract* shall deliver to each person who does not in fact receive any of the money, property, or services which are the subject matter of the consumer credit contract, prior to that person's becoming obligated on the consumer credit contract, a notice in English and Spanish in at least 10-point type as follows: [¶] NOTICE TO COSIGNER . . . [¶] You are being asked to guarantee this debt. Think carefully before you do. If the borrower doesn't pay the debt, you will have to. Be sure you can afford to pay if you have to, and that you want to accept this responsibility. [¶] You may have to pay up to the full amount of the debt if the borrower does not pay. You may also have to pay late fees or collection costs, which increase this amount. [¶] The creditor can collect this debt from you without first trying to collect from the borrower. The creditor can use the same

provide plaintiff the required notice-to-cosigner under those statutes constituted an actionable unlawful business practice under the UCL.

Plaintiff's challenge on appeal is premised on the assertion that the lease which he cosigned was a consumer credit contract as defined in section 1799.90, subdivision (a)(4) and (5) entitling him to notice. That section provides the following definitions: "(a) 'Consumer credit contract' means any of the following obligations to pay money on a deferred payment basis, where the money, property, services or other consideration which is the subject matter of the contract is primarily for personal, family or household purposes: [¶] (1) Retail installment contracts, as defined in Section 1802.6. [¶] (2) Retail installment accounts, as defined in Section 1802.7. [¶] (3) Conditional sales contracts, as defined in Section 2981. [¶] (4) *Loans or extensions of credit secured by other than real property, or unsecured, for use primarily for personal, family or household purposes.* [¶] (5) *Loans or extensions of credit for use primarily for personal, family or household purposes* where such loans or extensions of credit are subject to the provisions of Article 7 (commencing with Section 10240) of Chapter 3 of Part I of Division 4 of the Business and Professions Code, Division 7 (commencing with Section 18000), Division 9 (commencing with Section 22000), or Division 10 (commencing with Section 24000) of the Financial Code,

---

collection methods against you that can be used against the borrower, such as suing you, garnishing your wages, etc. If this debt is ever in default, that fact may become a part of your credit record. [¶] This notice is not the contract that makes you liable for the debt." (Italics added.)

whether secured by real property or otherwise. [¶] (6) *Lease contracts*, as defined in Section 2985.7.[16]" (Italics added.)

Under plaintiff's interpretation of the statutory scheme, a loan or extension of credit as defined in section 1799.90, subdivision (a)(4) and (5), would include a vehicle lease. But vehicle leases are separately defined in section 1799.90, subdivision (a)(6) and the required notice-to-cosigners of vehicle leases is separately set forth in section 1799.91, subdivision (d). Therefore, plaintiff's interpretation runs afoul of the rule of statutory construction which counsels against constructions that render any statutory language surplusage because, under plaintiff's interpretation, the separate definition of vehicle leases and the separate notice requirement for such leases would be redundant and unnecessary.

By defining leases separately from loans or extensions of credit in section 1799.90, the legislature expressed a clear intent to distinguish between the two types of consumer credit contracts for purposes of determining whether a given contract is subject to the notice-to-cosigner requirements of section 1799.91. Under

---

16 Section 2985.7 is part of the Vehicle Leasing Act and it provides definitions applicable to vehicle leases covered by that act. Subdivision (a) defines the term "motor vehicle" to mean "any vehicle required to be registered under the Vehicle Code. Motor vehicle does not include any trailer which is sold in conjunction with a vessel."

The trial court granted summary adjudication of the fourth cause of action for violation of the UCL based on an alleged underlying violation of section 1799.91, subdivision (d) dealing with the notice requirement for cosigners of vehicle leases, finding that those requirements did not apply to the lease in issue because the 2006 Explorer was not registered in California.

the governing rules of statutory construction discussed above, we conclude that the vehicle lease agreement that plaintiff cosigned was not subject to notice-to-cosigner requirements of section 1799.91, subdivision (a) because it was not a consumer credit contract as defined in section 1799.90, subdivision (a)(4) and (5). (See, e.g., *Bescos v. Bank of America* (2003) 105 Cal.App.4th 378, 393 ["the lease agreement does not qualify as 'consumer credit contract'" within the meaning of the Fair Trade Commissions Act]; accord, *LaChapelle v. Toyota Motor Credit Corp.* (2002) 102 Cal.App.4th 977, 987.) The trial court therefore did not err in granting summary adjudication of plaintiff's third cause of action.

IV. DISPOSITION

The jury's economic damage award is reversed, but in all other respects, the judgment is affirmed. The matter is remanded with instructions to enter a new judgment in favor of plaintiff that omits the award of economic damages and to conduct further proceedings on whether to modify the amount of attorney fees awarded in light of that reduced judgment. Plaintiff Kealy's cross-appeal of the attorney fee order is dismissed. Defendant Ford Motor Credit Company is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

RUBIN, P. J.

MOOR, J.